No. 11689

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

WESTERN UNION TELEGRAPH COMPANY, a corporation, *Appellant*,

vs.

HANSEN & ROWLAND CORPORATION, a corporation, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

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JURISDICTION

Jurisdiction of the trial court in this cause is based upon U.S.C. Title 28, §41 (1) conferring upon Federal District Courts original jurisdiction of all suits of a civil nature where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000, and is between citizens of different states. In this cause the plaintiff, a Washington corporation, sued the defendant, a New York corporation, on a complaint (R. 2) to recover continually accumulating damages, alleged at a daily rate, which amounted to the sum of $3772 when the cause was effectively commenced and to the sum of $4920 when the cause

was removed from the State to the Federal Court, liability for which was denied by the defendant in its answer (R. 32).

Jurisdiction of the appellate court in this cause is based upon U.S.C. Title 28, §225, authorizing an appeal to a United States Circuit Court of Appeals from final decision in a Federal District Court, and upon U.S.C. Title 28, §230, requiring such an appeal to be taken within three months after entry of judgment. In this cause the judgment of the trial court (R. 61) was entered on June 2, 1947 (R. 62); and notice of appeal and supersedeas bond were duly filed on June 11, 1947 (R. 67, 68, 69; F.R.C.P. Rule 73).

ABSTRACT OF THE CASE

In this cause Hansen & Rowland Corporation as plaintiff (appellee) is seeking to recover from The Western Union Telegraph Company as defendant (appellant) statutory penalty for unlawful detainer of real property as defined by §812 of Remington's Revised Statutes of Washington.

After removal from the Superior Court of the State of Washington for the County of Pierce and after joinder of issues in the United States District Court for the Western District of Washington, Southern Division, the cause was presented for adjudication upon the complaint (R. 2), the answer (R. 32) and the stipulation of facts (R. 37) without any testimony and without a jury.

In outline the facts disclosed by the record are as follows:

(a) At all times material the plaintiff was the owner of business premises known as 1007 Pacific Avenue in the City of Tacoma (R. 37).

(b) At all times material to and including October 31, 1946, the defendant was tenant of said premises in lawful possession under a valid written lease (R. 37).

(c) At all times during the currency of said lease the rent thereunder at the rate of $325 per month was fully paid (R. 34, 38).

(d) The defendant received the plaintiff's notice dated July 24, 1946, which ended the term of said lease as of October 31, 1946 (R. 37, 40; Ex. 1).

(e) The defendant received from the plaintiff its unqualified notice dated September 25, 1946, to quit and surrender (R. 37, 42; Ex. 2).

(f) The defendant orally notified the plaintiff on October 8, 1946, that the defendant was unable to vacate, whereupon the plaintiff orally advised the defendant that the sum of $750 per month was a reasonable rental value of said premises. Thereafter, the defendant received letter from the plaintiff offering to accept payment in advance of $1500 per month, being $750 as "reasonable rental value" and $750 as special damages (R. 37, 38, 43; Ex. 3).

(g) The defendant received from the plaintiff its *alternative* notice dated November 2, 1946, to pay rent or to quit and surrender (R. 38, 45; Ex. 5).

(h) The defendant as a public service corporation was unable to move and continued in possession after October 31, 1946, until March 7, 1947 (R. 37, 38, 40).

(i) At all times material after October 31, 1946, the reasonable rental value of said premises was the sum of $750 per month (R. 37, 39).

(j) In advance, month by month, successively and cumulatively, the defendant made legal tender of rent at the rate of $750 per month for the entire period of its occupancy after October 31, 1946,—which, in the total sum of $3750 was duly deposited in the registry of the trial court (R. 38, 39, 44, 46, 47, 48, 49; Exs. 4, 6, 7, 8, 9).

(k) On March 7, 1947, said premises were completely vacated by the defendant and possession thereof entirely surrendered to the plaintiff (R. 40).

(l) As a result of the defendant's occupancy of said premises the plaintiff suffered no special damages as alleged by its complaint or otherwise (R. 38).

SPECIFICATION OF ERRORS

The appellant has specified errors (R. 73) by the trial court as follows:

1. In refusing findings of fact as proposed by the defendant (R. 53);

2. In refusing conclusions of law as proposed by the defendant (R. 53);

3. In refusing judgment as proposed by the defendant (R. 55);

4. In disregarding the defendant's disapproval of and objections to findings, conclusions and judgment as proposed by the plaintiff (R. 50, 51, 52);

5. In making findings, drawing conclusions and granting judgment as signed and filed on June 2, 1947 (R. 56-62) without hearing thereon and in the absence of attorneys for either the plaintiff or the defendant (R. 60, 62, 63).

STATEMENT OF POINTS

Appellant relies upon the following points:

1. The trial court erred in ruling that the defendant wrongfully detained said premises for the period beginning November 1, 1946, and ending March 7, 1947 (R. 60, 73);

2. The trial court erred in ruling that by reason of such unlawful detainer the plaintiff was entitled to judgment against the defendant for statutory penalty in double the amount of the reasonable rental value of said premises during said period, amounting to $6350 (R. 60, 73);

3. The trial court erred in granting judgment for the plaintiff against the defendant in the sum of $6350, with interest and with costs (R. 62, 73);

4. The trial court erred in granting judgment to the plaintiff which failed to exonerate the defendant except only for reasonable value of said premises at the rate of $750 per month for said period, in the total sum of $3175, tendered by the defendant and deposited in court (R. 61, 73).

ARGUMENT

The defendant was not guilty of unlawful detainer under Rem. Rev. Stat. §812 because the plaintiff elected to treat the defendant not as a trespasser but as a tenant.

As the result of the defendant's possession without the plaintiff's consent in the absence of agreement as to the rate of rental, the defendant became a tenant at sufferance under Rem. Rev. Stat. §10621.

The defendant as a tenant at sufferance, having duly tendered and paid the reasonable rental value of the premises, was not subject to statutory penalty in double that amount.

The factual basis for the District Court's adjudication without a jury consisted solely of the plaintiff's complaint, the defendant's answer, and the signed stipulation of facts with attached exhibits. The facts are not in dispute. Hence, on the appeal as at the trial this cause presents only questions of law.

In suing, the plaintiff invoked the statutes of the State of Washington defining and penalizing unlawful detainer of real property. So far as requiring discussion such statutes provide:

> "A tenant of real property for a term less than life is guilty of unlawful detainer either—
>
> "(1) When he holds over or continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him. In all cases where real property is leased for a specified term or period by express or implied contract, whether written or by parol, the tenancy shall be terminated without notice at the expiration of such specified term or period; or
>
> "(3) When he continues in possession in person or by subtenant after a default in the payment of any rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner hereafter in this Act provided) in behalf of the person entitled to the rent upon the person owing (owning) the same, shall have remained uncomplied with for the pe-

riod of three days after service thereof. * * *" (Remington's Revised Statutes, §812)

"The jury, or the court if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any * * * unlawful detainer, alleged in the complaint and proved on the trial, and if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of * * * unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due." (Remington's Revised Statutes, §827)

The question of law for determination: Was the defendant guilty of unlawful detainer?

Correct answer to this query requires careful consideration of the communications between the plaintiff and the defendant, as follows:

First—Notice dated September 25, 1946, from the plaintiff to the defendant "to quit and surrender" possession of the premises "at the expiration of" the defendant's "tenancy on the first day of November, 1946" (R. 42-Ex. 2).

Second—Letter dated October 8, 1946, from the plaintiff to the defendant, saying:

"Referring to your continuing in possession of the premises * * * after October 31st, 1946, please be advised that you may continue such possession for a period not exceeding four months after the expiration of the present lease on the following terms and conditions. You are to pay, in advance, rental at the rate of $1500 per month

monthly; however, you shall have the option and privilege of vacating and surrendering up the premises at any time during the month, providing you give the owners ten days' written notice of your intention and desire so to do, and upon vacating, the unearned portion of any month's rental will be refunded to you. Conditions of space in the City of Tacoma are such that it was necessary for the owners to move one of the departments of their business to Seattle pending the time they can get possession of said premises. *They regard the premises as having a reasonable rental value of $750 per month*, and the moving of this department to Seattle so that it could be kept intact, and employing of additional help incident to having one branch of their business done in Seattle, will cost at least $750 per month * * *. If you desire to avail yourself of this proposal, you may do so by endorsing your acceptance hereon and returning same to writer." (R. 43-Ex. 3)

Third—Letter dated October 30, 1946, from the defendant to the plaintiff accompanying tender, saying:

"Herewith is tendered the sum of Seven Hundred and Fifty Dollars in U. S. currency, covering rental for the month of November, 1946—that amount having been claimed and demanded by your letter of October 8, 1946, as the reasonable monthly rental value of the space above mentioned, which this company is compelled by circumstances to occupy until vacation is possible." (R. 44-Ex. 4)

Fourth—Notice dated November 2, 1946, from the plaintiff to the defendant, saying:

"Please take notice that you are hereby required to pay the rental of $1500, which became due and payable on the 1st day of November, 1946, as rental for the premises now occupied by you * * * within three days following the date of service of this notice, or in the alternative, to quit, vacate and surrender to the undersigned owners thereof possession of said premises." (R. 45-Ex. 5)

In the background of these communications between the plaintiff and the defendant as related to the statutory definitions of unlawful detainer, the plaintiff contended, in the District Court, that the defendant was forced into one of only two possible positions, to-wit:

A. That having impliedly accepted the offer of plaintiff's letter dated October 8th, the defendant's possession after October 31st was lawful, with accompanying obligation to pay rent in the sum of $1500 per month; or

B. That having rejected the offer of plaintiff's letter dated October 8th, the defendant's possession after October 31st was unlawful, with obligation for damages in the reasonable rental value of the premises being $750 per month.

After posing these propositions the plaintiff argued in the District Court that the defendant being caught in a dilemma with only two alternatives, the court was bound to adjudge either,

A. That the defendant, being a tenant in lawful possession but in default as to fifty per cent of the agreed rent, was liable for the unpaid balance and penalty in the sum of twice the whole rent; or

B. That the defendant, being a trespasser in unlawful possession, was liable for damages in the reasonable value of the premises and also liable for penalty in twice that amount.

In other words, the plaintiff contended below that the defendant must occupy only one of two statuses: (A) a tenant under obligation to pay any arbitrary rent demanded by the plaintiff; or (B) a trespasser under liability to pay damages.

Quite otherwise, the defendant continues to contend in the same factual background that the defendant occupied another different, intermediate status, to-wit, a tenant at sufferance—a status defined by the statutes of the State of Washington as follows:

> "Whenever any person obtains possession of premises without the consent of the owner * * * he shall be deemed a tenant at sufferance merely, and shall be liable to pay reasonable rent for the actual time he occupied the premises, and shall forthwith on demand surrender his said possession to the owner * * * and all his right to possession of said premises shall terminate immediately upon said demand." (Remington's Revised Statutes, §10621)

This status of an occupant of real property in the State of Washington has been recognized by this court in *Klee v. U. S.*, 53 F.(2d) 58 (1931-C.C.A. 9). In this case the occupant was in possession "under a color of right" arising from a sublease which the court assumed to be "wholly invalid." The court's opinion said:

> "Decision of this controversy hinges upon the question of whether or not the appellants were

trespassers * * *. Under the circumstances of the lease and under the Washington statute they were at least 'tenants by sufferance' and not trespassers. (§10621 quoted in full) * * *

"Furthermore, as we have seen, even if we assume that the purported sublease was wholly invalid, under the Washington law appellants would have been considered merely tenants by sufferance, and not trespassers."

Klee v. U. S., 53 F.(2d) 58, 59, 61 (C.C.A. 9).

The same recognition of the intermediate status of a tenancy at sufferance has been accorded by the Supreme Court of the State of Washington.

In *McCourtie v. Bayton*, 159 Wash. 418, an occupant was in possession of a residence a few days before the commencement of a month-to-month tenancy for which the first month's rent had been paid. During this preliminary period he was injured by the alleged negligence of a repair man employed by the owner, with resulting necessity of determining whether the occupant was a trespasser or a tenant. In holding that the occupant was a tenant by sufferance the court quoted Rem. Rev. Stat. §10621 and said:

"It is manifest that, under the foregoing statute, the landlord was protected by the legal right to recover reasonable rent for the actual time of the occupancy and the right to demand immediate possession of the premises which would terminate the right of possession at once. No such steps were taken. Therefore, even granting that no agreement had been reached as to the tenancy from February 5 to 8, there was a tenancy by sufferance."

McCourtie v. Bayton, 159 Wash. 418, 422, 423; 294 Pac. 238, 240.

In *Provident Mutual Life Insurance Co. v. Thrower*, 155 Wash. 613, the appellant had bought furniture and furnishings in a lodging house from a previous tenant and began paying some sums as rental on the real property to the agent of the respondent, a non-resident owner, without agreement having been reached as to the rate of rental as between appellant and respondent. By notice, followed by suit in unlawful detainer, the respondent claimed rent to be in arrears in the sum of $430 at the rate of $100 per month. The court found that appellant and respondent had never reached agreement as to the rate of the rent. In the course of the opinion, citing as authority §10621, the court said:

> "If there was no meeting of minds upon the rent to be paid per month, respondent is entitled to recover upon a *quantum meruit*. *Williamson v. Hallett*, 108 Wash. 176, 182 Pac. 940; Rem. Comp. Stat. Sec. 10621."
>
> *Provident Mutual Life Insurance Co. v. Thrower*, 155 Wash. 613, 616; 285 Pac. 654, 655.

In *Williamson v. Hallett*, 108 Wash. 176, the appellant, conditional sale vendor of furniture used by the conditional sale vendee, repossessed the furniture by ousting the vendee and entering into the occupancy of the roominghouse without the consent of respondent, the landlord. The respondent as owner of the real property served notice upon appellant to quit or pay rent, and thereafter sued for unlawful detainer. In ruling as to appellant's status the court said:

"Appellant argues that, to warrant a recovery in an action of this kind, the conventional relation of landlord and tenant is indispensable and must be clearly established. Conceding this to be the law, it does not follow that such a relationship can be created only by express agreement between the parties. *Sheridan v. Doherty*, 106 Wash. 561, 181 Pac. 16. There may be and frequently is an implied contract which just as certainly creates the conventional relationship.

" 'The relation of landlord and tenant may be created by implication or by express contract. The law will, in general, imply the existence of a tenancy wherever there is an ownership of land on the one hand, and an occupation by permission on the other; for in such cases it will be presumed that the occupant intended to pay for the use of the premises. It will be implied, in many cases, where there has been no distinct agreement between the parties, or where, from various causes, the agreement may have ceased to be operative.' 1 Taylor, Landlord and Tenant (9th ed.) §19.

"So here, as found by the trial court and established by the testimony, as we read it, although appellant entered without the knowledge or express permission of respondents, yet they immediately gave their permission by demanding the rent; and the notice to quit or pay rent in itself shows permission on their part. While we are convinced that, from the facts shown, the law will imply a tenancy and an agreement to pay rent, yet if there was no permission, the legislature has put the question at rest in this state by statute, Rem. Code, sec. 8805" (being the same as Rem. Rev. Stat. §10621, the present tenancy by sufferance statute).

Williamson v. Hallett, 108 Wash. 176, 178, 179; 182 Pac. 940, 941.

DEFENDANT'S FIRST CONTENTION

In the light of this law of the State of Washington as to tenancy at sufferance, the defendant is not liable under subsection (1) of Rem. Rev. Stat. §812 for unlawful detainer penalty on the facts in this case.

Because of the plaintiff's notice dated July 24th the life of the lease according to its terms was definitely ended on October 31st. Plaintiff's absolute notice to "quit *and* surrender," dated September 25th (R. 42-Ex. 2) although possibly psychologically expedient was certainly legally superfluous, Rem. Rev. Stat. §812(1). In any event, before subsequent negotiations between the plaintiff and the defendant, and before subsequent notices from the plaintiff to the defendant, the plaintiff had unqualified right to treat the defendant as a trespasser if it continued in possession after October 31st.

But before commencing this action the plaintiff waived such right to proceed against the defendant as a trespasser.

Plaintiff (after having offered on October 8th to permit the defendant to continue as a tenant in lawful possession upon advance payment of $1500 per month, and after having received on October 30th defendant's tender of $750 for November) elected to treat the defendant as a tenant by plaintiff's notice dated November 2nd (R. 45-Ex. 5) wherein plaintiff declared rent "became due and payable on the first

day of November, 1946," and granted defendant the option *either* "to pay" *or* "to quit."

In this legal conclusion the defendant is supported by the express language and the plain purpose of the plaintiff's notice dated November 2nd, and also by the already quoted opinion of the Washington Supreme Court construing the legal effect of similar alternative notice, wherein that court said

> "* * * the notice to quit or pay rent in *itself* shows permission on their (the landlords') part."
>
> *Williamson v. Hallett*, 108 Wash. 176, 179; 182 Pac. 940, 941.

Hence, the unlawful possession of the defendant, obtaining on November 1st, was converted by the plaintiff itself on November 2nd into the lawful possession of the defendant, which so remained thereafter, since the plaintiff never at any time served upon the defendant later notice of any kind to alter the same. In other words, the plaintiff changed the defendant's status of trespasser as existing on November 1st into the defendant's status of tenant at sufferance as existing at all times after November 2nd.

Therefore, on the date the plaintiff subsequently instituted this cause the defendant was a tenant at sufferance. On that date the defendant was not (to paraphrase subsection (1) Rem. Rev. Stat. §812) "holding or continuing in possession after the expiration of the term for which let to the defendant under the original lease terminated as of October 31st."

To conclude discussion respecting subsection (1) of

Rem. Rev. Stat. §812, that subsection not being applicable to the defendant or its possession when the action was begun, the defendant was not guilty of unlawful detainer thereunder, and is not now liable for penalty thereunder.

DEFENDANT'S SECOND CONTENTION

In the light of the law of the State of Washington as to tenancy at sufferance, established by the statute (Rem. Rev. Stat. §10621) and the decisions heretofore reviewed, the defendant is not liable for unlawful detainer penalty under subsection (3) of Rem. Rev. Stat. §812.

By its letter of October 8th (R. 43, Ex. 3) the plaintiff proposed that the defendant after October 31st continue in lawful possession of the premises on condition that the defendant pay in advance the sum of $1500 per month. The defendant never accepted this offer. However, the defendant did consider this offer from October 8th until October 30th.

The plaintiff's letter of October 8th made two important assertions: first, that the premises had a "reasonable rental value of $750 per month"; second, that the plaintiff would have "to move one of the departments" of its business to Seattle with resulting "cost at least $750 per month" to the plaintiff during the defendant's continued occupancy. Having failed to secure another renewal of its lease — already several times previously extended (R. 57)—and being unable to disrupt its public service by vacation of the premises on October 31st, the defendant's consideration of the plaintiff's offer developed several conclu-

sions: (a) that the plaintiff would actually suffer no special damages as claimed in the sum of $750 or any other sum; (b) that $750 per month was a high figure as representing the reasonable rental value of the premises; (c) that the defendant must tender and pay whatever amount was the actual reasonable rental; and (d) that if the defendant did tender and pay the sum of $750 per month, which the plaintiff itself set as the reasonable value, then unlawful detainer penalty could not be legally awarded.

So motivated, on October 30th the defendant replied to the plaintiff's offer with a legal tender of $750—"that amount having been claimed and demanded" by the plaintiff "as the reasonable monthly rental of the space" (R. 44, Ex. 4).

However, the plaintiff by its letter of October 8th had demanded an arbitrary, exorbitant rent in the sum of $1500, being expressly based upon $750 claimed as reasonable rental value plus $750 claimed as special damages—the excessive quality of plaintiff's demand in the sum of $1500 now being settled in this cause by the stipulation of facts, which recites in paragraph 7 (R. 38) "that the plaintiff suffered no special damages as alleged by its complaint or otherwise, and is not entitled to recovery thereof."

Because plaintiff's demand for $1500 was extortionate it was not accepted by the defendant. The blank endorsement for acceptance at the bottom of plaintiff's letter of October 8th was never signed by the defendant as requested therein (R. 44, Ex. 3). The defendant's tender of $750 on October 30th was an

affirmative rejection of the plaintiff's demand for $1500 to the extent of half that amount (R. 44, Ex. 4).

Since the defendant never accepted the plaintiff's demand at the rate of $1500 and the plaintiff never accepted the defendant's tender at the rate of $750, it necessarily follows that on November 1st the plaintiff was not consenting to the defendant's possession as then obtaining, and that after November 1st there was nothing but disagreement between the plaintiff and the defendant as to the amount of rent to be paid and received for the premises.

Nevertheless, on November 2nd, with no agreement about the rate of rent, the plaintiff elected to treat the defendant not as a trespasser but as a tenant, by serving plaintiff's notice, which gave to the defendant the option either "to pay" or "to quit" (R. 45-Ex. 5). As a matter of law, already demonstrated, this notice of November 2nd converted unlawful possession obtaining on November 1st into lawful possession at all times thereafter — the possession of a statutory tenant at sufferance. But, plaintiff's notice of November 2nd neither changed disagreement as to the rate of rent into agreement nor modified the defendant's obligation therefor. Being a tenant at sufferance, the defendant was bound by statute only "to pay reasonable rent for the actual time" it "occupied the premises" (Rem. Rev. Stat. §10621).

Such was the defendant's status on the later date when the plaintiff initiated this cause. On that date the defendant was not (to paraphrase subsection (3)

Rem. Rev. Stat. §812) "continuing in possession after a default in the payment of any rent" because the plaintiff and the defendant had no contract, express or implied, as to rent in any specific amount, and because the defendant had already tendered all rent due in the sum of $750 representing the reasonable rental value of the premises as then claimed by the plaintiff (R. 43-Ex. 3) and as since stipulated of record (R. 39).

To conclude discussion respecting subsection (3) of Rem. Rev. Stat. §812, that subsection not being applicable to the defendant or its possession when this cause was begun, the defendant was not guilty of unlawful detainer thereunder, and is not now liable for penalty thereunder because of its successive, cumulative tenders timely made and also timely perpetuated by deposits in court.

CONCLUSION

In conclusion, the defendant contends in this cause upon the undisputed facts there being no unlawful detainer established as defined by any applicable subsection of Rem. Rev. Stat. §812, the judgment of the District Court should have been in favor of the defendant and against the plaintiff to the extent and to the effect that the plaintiff take, but take only, from the defendant's tenders on deposit the sum of $3175, being the reasonable rental at the rate of $750 per month for the period beginning November 1, 1946, and ending March 7, 1947, that being "the actual time it occupied the premises" (Rem. Rev. Stat. §10621). Otherwise stated, the defendant contends that on the

facts in this cause the plaintiff was not entitled to judgment in its favor in excess of the amount conceded, and, hence, was not entitled to any penalty under Rem. Rev. Stat. §827.

Finally the defendant contends that this court should now reverse the judgment of the District Court, with mandate directing the return to the defendant of the residue of its deposit in the sum of $575 and allowing to the defendant its costs and disbursements.

Respectfully submitted,

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